

memorandum

date: OCT 27 1998

to: Jerry Fisher
Group Manager, Group 1702

from: Edward F. Peduzzi, Jr.
Associate District Counsel, Pennsylvania
(CC:NER:PEN:PIT:TL-N-6885-98:EJLaubach, Jr.)

subject: Designation of Tax Matters Partner
re: [REDACTED]

THIS DOCUMENT MAY CONTAIN TAXPAYER INFORMATION SUBJECT TO SECTION 6103. THIS DOCUMENT MAY ALSO CONTAIN CONFIDENTIAL INFORMATION SUBJECT TO THE ATTORNEY-CLIENT AND DELIBERATIVE PROCESS PRIVILEGES AND MAY ALSO HAVE BEEN PREPARED IN ANTICIPATION OF LITIGATION. THEREFORE, THIS DOCUMENT SHALL NOT BE DISCLOSED TO TAXPAYERS OR THEIR REPRESENTATIVES OR DISCLOSED OR CIRCULATED BEYOND OFFICE PERSONNEL HAVING THE REQUISITE "NEED TO KNOW."

Your [REDACTED] team has asked our advice:

ISSUES

1. Who could the Service select as the Tax Matters Partner of a TEFRA partnership if the general partner has been dissolved but a limited partner still survives? (Scenario 1)
2. Who should the Service select as the Tax Matters Partner of a partnership if both the general and limited partners no longer exist? (Scenario 2)
3. Who can execute a consent to extend the statute of limitations on assessment in both of the factual situations described above?
4. Are partnership consents to extend the statute of limitations on assessment executed by a [REDACTED] official who was authorized to sign consents for [REDACTED] and all of its subsidiaries valid if the TMP-general partner, a [REDACTED] subsidiary, was dissolved at the time that the consent was executed?

CONCLUSIONS

1. Under Scenario 1, the Service could select the limited partner as the new TMP. Notice of such selection must be mailed to the limited partner, all partners, and the partnership.
2. Under Scenario 2, if all partners no longer exist, a new TMP cannot be selected. However, a new TMP may not need to be selected. A consent signed by the parent [REDACTED] will keep the statute of limitations open on the defunct [REDACTED] subsidiary under the consolidated return regulations.
3. Under both factual scenarios, [REDACTED], as the common parent corporation under the consolidated return regulations, is the proper party to execute a consent on behalf of its controlled subsidiaries. In Scenario 1, both the limited partner subsidiary and [REDACTED], the common parent, should sign the consent. In Scenario 2, a waiver signed by [REDACTED] will keep the statute open for adjustments to be made to the consolidated return but will not keep the statute open for the unrelated limited partner.
4. The prior consents executed by [REDACTED], the common parent, are valid to bind the [REDACTED] subsidiary partners under the consolidated return regulations and section 6229(b)(1)(A) even though the TMPs were terminated by dissolution.

FACTS

During the [REDACTED] examination for the years [REDACTED] and [REDACTED], the Examination team wished to extend the statute of limitations on assessment for several partnerships in which [REDACTED] subsidiaries were partners. The problem in each of these cases is the Tax Matters Partner, hereinafter called the TMP, for these partnerships no longer exists. The question then becomes who now can execute a consent to extend the statute of limitations on assessment on behalf of these partnerships. In addition, it appears that the last consents to extend the statutory period for assessment were signed after the TMP for the partnership had been dissolved. The Examination team questions whether these consents are still valid. The specific facts concerning these issues are presented below as Scenarios 1 and 2:

SCENARIO 1

In Scenario 1, the Examination team has three cases involving TEFRA partnerships having only one general partner and one limited partner, both of which were controlled subsidiaries of [REDACTED] and members of the consolidated return group during the years in issue. The assets of these partnerships were sold to unrelated parties in [REDACTED] or [REDACTED] and the partnerships were dissolved after the sale. The general partners, which were designated as the TMPs, were also dissolved in the following year. The limited partners, still subsidiaries of [REDACTED], continue to exist today.

In [REDACTED], the Service secured consents, Forms 872-P, to extend the statute of limitations on assessment for these partnerships to [REDACTED]. These consents were signed by an officer at [REDACTED] who has the authority to execute consents for [REDACTED] and its subsidiaries. On [REDACTED], the Service was first notified that the general partners of these three partnerships had been dissolved in [REDACTED]. It thus appears that these general partners were dissolved at the time that the partnership consents were executed in [REDACTED]. The Examination team asks whether these prior consents are valid and, if so, who should execute the latest consents. In addition, they ask who should be designated the TMP for these partnerships.

SCENARIO 2

In the second scenario, a partnership, [REDACTED], consisted of a [REDACTED] subsidiary [REDACTED], which was the general partner and the TMP, and a limited partner, an unrelated entity known as the [REDACTED]. The assets of the partnership were sold in [REDACTED] to an third party. Both the partnership and [REDACTED] were dissolved in [REDACTED]. The limited partner also went out of existence in [REDACTED]. A consent to extend the statute of limitations on assessment was executed on behalf of this partnership by [REDACTED] on [REDACTED], but the general partner had ceased its existence by that date. Again, the Examination team questions whether this prior consent is valid if the TMP was dissolved at that time and who can now execute a consent to extend the statutory period of assessment.

LEGAL DISCUSSION

TMP SELECTION

Under the TEFRA partnership procedures, the examination of partnership tax returns is handled at the partnership level through the Tax Matters Partner, hereinafter called the TMP. The TMP is the central figure in the unified audit and litigation procedures and is the focal point for Service notices, documents, and orders. Generally, the partnership designates the TMP who under I.R.C. § 6231(a)(7) must be a general partner in the partnership during the taxable year in issue or thereafter. Problems can arise if the TMP is terminated and no successor is or can be designated. This is the fundamental dilemma in the [REDACTED] partnerships.

In both scenarios, the sole general partner, a [REDACTED] subsidiary, which had been designated the TMP, has been legally dissolved. Under Treas. Reg. § 301.6231(a)(7)-1(1)(1) a designation of a TMP for a taxable year remains in effect until one of a number of events occurs; one such event is the liquidation or dissolution of the TMP, if the TMP is an entity. In such case, actions taken by the TMP prior to the termination

of its designation, such as execution of a consent to extend the statutory period for assessment, remain valid and unaffected by the TMP's termination.

In most cases, the partnership will then proceed to designate another TMP for the partnership. This response could not happen in the [REDACTED] partnerships because there are no other general partners who could qualify as the TMP. In such a case, the regulations, § 301.6231(a)(7)-1(m), dictate who then becomes the TMP. Where a TMP has been terminated and there has not been a subsequent designation, the TMP would then be the general partner having the largest profits interest in the partnership at the close of the taxable year in issue. If no designation has been made and it is impracticable to apply the largest profits interest rule, the Commissioner may then select the TMP. Impracticability results when the general partner with the largest profits interest is not apparent, when such partner is disqualified, or when each general partner is deemed to have no profits interest in the partnership. See Treas. Reg. § 301.6231(a)(7)-1(o). This latter situation occurs when each general partner is deemed to have no profits in the partnership because one of the events of termination under § 301.6231(a)(7)-1(l)(1) has occurred with respect to each general partner. This is the [REDACTED] situation since there exists no general partner who has not suffered a termination event in each of the partnerships in question.

Under such circumstances, the Commissioner may select a new TMP pursuant to Treas. Reg. § 301.6231(a)(7)-1(p)(2). The TMP to be selected must be a partner, whether a general or limited partner, who was a partner in the partnership at the close of the taxable year under examination under § 301.6231(a)(7)-1(q)(1) and should be selected based upon the criteria set forth in § 301.6231(a)(7)-1(q). These criteria include the general knowledge of the partner in tax matters and the administrative operation of the partnership, access to books and records of the partnership, the profits interest held by the partner, whether the partner is a partner at the time the selection is made, the views of the partners having the majority interest in the partnership, and whether the partner is a United States person. The Commissioner is required to notify both the partner selected and the partnership of the selection effective as of the date specified in the notice. See Treas. Reg. § 301.6231(a)(7)-1(p)(2).¹ The selection process outlined in § 301.6231(a)(7)-1 applies to selections occurring on or after December 23, 1996, and is thus applicable to the current situation in [REDACTED] s partnerships.

Applying the aforementioned regulation to the present case, the designated TMP of the [REDACTED] partnerships was

¹Under the Tax Reform Act of 1998, I.R.C. § 6231(a)(7) now requires notice of the selected TMP be given to all partners within 30 days of the selection.

terminated when the TMP was dissolved. At that point, a successor TMP could not be designated by the partnerships because there were no other general partners. Under Treas. Reg. § 301.6231(a)(7)-1(p)(2), the Commissioner then may select a TMP which could include a limited partner if such partner was a partner at the end of the taxable year under examination. Here, there is only one choice for TMP under Scenario 1, the surviving limited partner who was a partner at the end of the taxable year under examination. The limited partners under Scenario 1 could therefore be selected as the new TMPs. Following such selection, the Service should immediately notify the limited partners and the partnerships of this selection. The limited partners, as the newly selected TMPs, could then execute the consent to extend the statute of limitations on assessment for these partnerships.²

The TMP selection process for Scenario 2 is more difficult since neither the general nor the limited partner exists today. We spoke to our National Office about this problem and they recommended that a TMP may not have to be appointed under these facts. If [REDACTED] executes a waiver for the defunct general partner, such a waiver will bind [REDACTED] under the consolidated return regulations since only the common parent can bind the consolidated group. If [REDACTED] executes a consent for this partner, then such consent will bind the [REDACTED] partner under I.R.C. § 6229(b)(1)(A).

EXECUTION OF CONSENTS

[REDACTED], the common parent of this consolidated group, is the proper party to sign any consent to extend the statute of limitations on assessment, whether for itself or one of its subsidiaries.

Under the consolidated return regulations, the common parent of the consolidated group is the sole agent for each subsidiary in the group and is authorized to act in its own name in all matters relating to the tax liability of the consolidated return group. No subsidiary has the authority to act for or represent itself in such a matter. The common parent in its own name may execute waivers, etc. and it will be treated as given by the subsidiary. Treas. Reg. § 1.1502-77(a). An agreement to extend the period for assessment executed by the common parent will be applicable to each corporation which was a member of the group during any part of the taxable year. § 1.1502-77(c).

Thus, the critical signature to secure in all of these partnerships is the signature of [REDACTED], the common parent. [REDACTED] is the only party which can bind the consolidated group. In the case of the Scenario 1 partnerships, the best method would be to have the [REDACTED] limited partner subsidiary, the new TMP, sign the consent and also have the

²Any consent should also be signed by [REDACTED], the common parent corporation, who alone has the authority to bind the consolidated group.

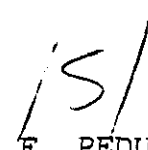
consent signed by [REDACTED] as well.³ For the Scenario 2 partnership, [REDACTED] can sign for its dissolved subsidiary and thus bind that partner under section 6229(b)(1)(A).

VALIDITY OF PRIOR CONSENTS

Under the given facts, it now appears that the TMPs of all of the partnerships in Scenarios 1 and 2 were terminated before the last waiver of the statute of limitations was executed by the partnerships. Although the regulations clearly protect the Service if a TMP executes a waiver and then is terminated, no such protection exists in the reverse situation presented here. If the TMP were truly terminated as a result of legal dissolution before waivers of the period of assessment were signed, the waivers did not extend the period of assessment for the partnerships. We do not believe that these waivers were a complete nullity however.

The consents in issue, Forms 872-P, were signed by an official at [REDACTED] who had the authority to sign consents to extend the statutory period on assessment for [REDACTED] and its subsidiaries. A signature by [REDACTED] would bind any of the subsidiaries which were included on the consolidated return. Thus, these prior consents, while not binding the partnerships because the TMP had been terminated, would bind the [REDACTED] subsidiary partners under section 6229(b)(1)(A). That provision allows an individual partner to extend the statutory period of assessment for that partner's liability; however, the other partners would not be bound by this waiver. Under IRM 4226.31(13)4(1), a consent for only one partner can be reflected on a Form 872-P or a Form 872 if special language is added thereto. The statutory period of assessment would therefore be protected by these prior waivers signed by [REDACTED] for the Scenario 1 partnerships where [REDACTED] subsidiaries constitute both partners and for [REDACTED] only in [REDACTED].

If you have any questions, please call Attorney Edward J. Laubach, Jr. at 412-644-3443.


EDWARD F. PEDUZZI, JR.

³If a general consent (Form 872) is used, it must contain a specific reference to partnership items. Section 6229(b)(2). A Form 872-P is therefore preferable.